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IN SUPREME COURT, STATE OF MINNESOTA

Case No. 34935

MINNEAPOLIS STREET RAILWAY COMPANY,
Plaintiff-Respondent,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., AS MAYOR OF THE CITY OF MINNEAPOLIS; CHARLES C. SWANSON, AS CITY CLERK OF CITY OF MINNEAPOLIS; GLADYS E. MILLER, AS CITY TREASURER OF CITY OF MINNEAPOLIS, AND O. J. TURNER, AS CITY COMPTROLLER OF CITY OF MINNEAPOLIS,
Defendants-Appellants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The basis of the jurisdiction of the Supreme Court of the United States to review the final decree of the Supreme Court of the State of Minnesota is as follows:

This is an action by the Street Railway Company under the Declaratory Judgment Act of the State of Minnesota for a decree adjudging that an ordinance of the City of Minneapolis, Minnesota, increasing the annual license fee on street cars from $25.00 to $100.00 to be null and void.

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(a) The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States is Title 28 U. S. C. A. (as revised June 25, 1948) Chapter 81, Section 1257, subdivision 2.

(b) The validity of an ordinance of the City of Minneapolis, State of Minnesota, is involved, which reads as follows:

> "From and after the first day of January, 1946, the annual license fee for each car shall be one hundred dollars ($100.00), and the said Minneapolis Street Railway Company shall pay to the City Treasurer of the City of Minneapolis on the first Monday of January in each year hereafter, commencing with 'the first Monday of January in the year 1947, an annual license fee of said sum per car for the average number of cars operated by it on its said lines of street railway during the next preceding year; provided, that for the year 1946 the license fee shall be eleven-twelfths of said sum for each car",

being the second paragraph of Chapter 61:19 Section 7, at page 1939 of the 1948 Edition of Minneapolis City Charter and Ordinances.

(c) The final decree of the Supreme Court of the State of Minnesota sought to be reviewed was entered on the 16th day of December, 1949 and the petition for this appeal was presented on the 10th day of January, 1950.

(d) Cases believed to sustain jurisdiction are:

Louisville v. *Cumberland Telephone Co.*, 224 U. S. 649 (1912);
Minneapolis v. *Street Railway Co.*, 215 U. S. 417 (1907);
Detroit v. *Detroit Citizens Street Ry. Co.*, 184 U. S. 368 (1902).

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(e) The questions involved are substantial:

Whether or not the ordinance in question is contrary to and in violation of plaintiff's existing grants, contract and franchise with and obtained from the City of Minneapolis, State of Minnesota, which plaintiff now owns and holds and which were owned and held by plaintiff at the time of the enactment of said ordinance, and impairs the obligations of said grants, contract and franchise in violation of Article I, Section 10 and the Fourteenth Amendment to the Constitution of the United States.

The validity of the ordinance in question was challenged by plaintiff in the District Court, County of Hennepin, Fourth Judicial District, State of Minnesota, by an action under the Declaratory Judgment Act of the State of Minnesota, seeking a decree that such ordinance was illegal and void as being one repugnant to and in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States. After defendants' answer was filed, plaintiff moved the District Court for a judgment on the pleadings, which motion was granted. The constitutional question was not passed on by the District Court, since it was held that the City of Minneapolis was without power and authority to pass such an Ordinance since such power and authority had been withdrawn from the City by the Brooks-Coleman Act and M. S. A. 220.01 to 220.09 vested in the Railroad and Warehouse Commission of the State of Minnesota, such power and authority. Thereafter, defendants appealed from the judgment, to the Supreme Court of the State of Minnesota. On appeal, the question of whether or not the ordinance was repugnant to Article I, Section 10 and the Fourteenth Amendment to the Constitution of the United States, was raised in plaintiff's brief. The constitutional questions were considered by the Supreme Court of the State of Minnesota and in deciding that the ordinance

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was not repugnant to Article I, Section 10 or the Fourteenth Amendment to the Constitution of the United States, the Court held:

> "It follows that the enactment by the city of the 1946 ordinance for the increase of the annual license fee per car from $25 to $100—subject, however, to a determination that such increase is necessary to defray the reasonable cost of police power measures and regulations as authorized by Sec. 220.09—constituted a valid exercise of its police power, which did not impair any obligations of contract or work a deprivation of any property rights in violation of either the federal or state constitutions."

There is appended hereto the order and opinion of the District Court and the opinion of the Supreme Court of the State of Minnesota.

Respectfully submitted,

FRED A. OSSANNA,
Attorney for Plaintiff.

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APPENDIX "A"

DISTRICT COURT, FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
County of Hennepin:

MINNEAPOLIS STREET RAILWAY COMPANY, *Plaintiff*,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., as Mayor of the City of Minneapolis; CHARLES C. SWANSON, as City Clerk of City of Minneapolis; GLADYS E. MILLER, as City Treasurer of City of Minneapolis, and O. J. TURNER, as City Comptroller of City of Minneapolis, *Defendants*

ORDER

The above entitled matter was duly tried and argued on June 9 and 10, 1947, and was finally submitted on briefs during March, 1948.

Messrs. Dorsey Colman, Barker, Scott & Barber, by Mr. Leland W. Scott and Mr. Charles F. Noonan of Minneapolis, Minnesota, represented the plaintiff.

Mr. John F. Bonner, City Attorney, and Mr. Charles A. Sawyer, Assistant City Attorney, appeared for the defendants.

The plaintiff having made a motion for judgment on the pleadings prior to the introduction of evidence herein, and the court having reserved his ruling on said motion, the court having now heard the arguments of counsel, having examined the pleadings together with all the records and files herein and having studied the briefs submitted by counsel and having carefully considered the same now has concluded that plaintiff's motion should be granted.

Wherefore, it is ordered and adjudged that plaintiff's motion for judgment on the pleadings be and the same is hereby in all things granted.

It is further ordered that judgment be entered that the ordinance enacted by the City Council of City of Minneapolis

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and approved by the mayor of said City on February 8, 1946, purporting to impose from and after the first day of January, 1946, an annual license fee of $100 on plaintiff for each car for the average number of cars operated by plaintiff on its lines of street railway in City of Minneapolis, provided that for the year 1946 the amount of said license fee is fixed at 11/12 of said sum for each car (a true copy of said ordinance marked Exhibit A being attached to plaintiff's complaint), is wholly invalid, illegal and void in that City of Minneapolis and the local authorities thereof were without power and jurisdiction to impose the annual license fee thereby sought to be imposed on plaintiff.

It is further ordered that judgment be entered declaring that the collection of the annual license fee sought to be imposed by said ordinance from plaintiff or its successors or assigns is and will be invalid, illegal and void and that plaintiff owes City of Minneapolis no amount whatever under and by virtue of the provisions of said ordinance and that defendants and each of them and their agents, servants employees and deputies and any and all persons acting by, through or under them are wholly without authority to administer said ordinance.

Let judgment be entered accordingly.

Dated May 10th, 1948.

By the Court.

LEVI M. HALL,
District Judge.

Stay of 30 days.

MEMORANDUM

The fact that the City is seeking to collect an annual license fee from plaintiff, which necessarily presupposes that the City has the power to license, permit, or prohibit the operation of plaintiff's business must be kept constantly in mind. It must also be kept in mind that the subject with which the challenged ordinance deals is a street railway operation which has been specifically dealt with by the State Legislature. The law is well settled that State law is paramount and supersedes municipal powers and laws if the latter conflicts with the former.

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Whether City of Minneapolis has power to license plaintiff's business and collect an annual license fee from plaintiff is a question for decision which must be answered before other issues raised by this proceeding can be resolved. It is claimed on behalf of the defendants that the City's power to regulate plaintiff's business requires the conclusion that by implication the City has the power to license plaintiff's business and exact an annual license fee from plaintiff. It appears from a reading of the challenged ordinance that it was enacted and approved on the assumption that the so-called police power of the City is sufficient to support the ordinance and validate the fee thereby sought to be imposed on plaintiff. The admission necessarily has to be made that this being so the City has the power to prohibit plaintiff's operation.

It appears clear that plaintiff is and has been continuously since a substantial period of time prior to 1890 operating a street railway system in the City of Minneapolis; that prior to April 14, 1921 plaintiff's operations and the pursuit of its business in and along the streets of Minneapolis was pursuant to lawful grant and authority derived from the State; that such grant and authority constitute a valid, binding and subsisting contract the terms and conditions of which were beyond the power of the City to recall or modify. George A. Nash et al. v. Thomas Lowry, et al. (1887), 37 Minn. 261; City of Minneapolis v. Minneapolis Street Railway Company, 215 U. S. 417, 436; that from and after plaintiff's acceptance of Chapter 278 Laws of Minnesota, 1921, 1 Minnesota Statutes 1945, Section 220.06 to 220.19, both inclusive, enacted into law on April 14, 1921, plaintiff became the holder of a lawful indeterminate permit to own, operate, manage and control its street railway including the right to conduct its business and operations in and along the streets of Minneapolis; that that indeterminate permit is still in existence and in full force and effect and was granted to it by the State pursuant to the provisions of Chapter 278, supra; that by Section 2 of Chapter 278, supra, all of the terms, conditions and obligations of plaintiff's then existing grant which had not expired are protected and required to be continued in force so long as the indetermi-

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nate permit obtained thereunder continues; that plaintiff's indeterminate permit is to continue in full force unless and until the defendant City of Minneapolis acquired plaintiff's property or unless the permit is terminated or modified by the State Legislature; and that by Section 14 of Chapter 278, supra, the only authority which may cancel or modify plaintiff's indeterminate permit or plaintiff's grant, permit or franchise held at the time of the enactment of Chapter 278 is the State. No distinction is to be drawn between the terms "franchise", "permit" and "License" for a reading of Chapter 278, supra, discloses without doubt that those terms are to be read as though they were synonymous.

It is my conclusion that the State Legislature intended by the enactment of Chapter 278, supra, to draw unto the State the entire power to license plaintiff, permit it to own, operate, manage and control its street railway and transportation system in the City of Minneapolis and to use the streets of the city in the conduct of that business and to deprive the City of Minneapolis of any power to license plaintiff's operations and business.

It is true that the City may regulate plaintiff's operations and business within the scope of plaintiff's grant and Chapter 278, supra, but this fact does not support the claim that the City may by implication exact a license fee from plaintiff for the reason that the State has completely drawn unto itself that power and exercised it leaving nothing to the City upon which it may validly base a claim of power to permit or deny to plaintiff the right to conduct its business in Minneapolis. The State alone, as the law now stands, has this power. To hold otherwise would require the court to ignore the plain terms of Chapter 278, supra.

I am satisfied that the challenged ordinance is invalid because it is in hopeless conflict with paramount State law; that it was enacted and approved after the receipt of an opinion of the City Attorney, which is in accord with the view herein expressed and I am so thoroughly convinced of the correctness of the conclusion reached by me that I find it unnecessary to at this time decide the other issues involved in this case. However, and while I do not so decide, for such assistance as it may be to counsel, I record the fact that I

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entertain grave doubt respecting the reasonableness of the license fee sought to be imposed on plaintiff by the challenged ordinance.

Let this memorandum be made a part of the foregoing order.

L. M. H.

APPENDIX "B"

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No. 151

HENNEPIN COUNTY

34935

MINNEAPOLIS STREET RAILWAY CO., *Respondent,*

vs.

CITY OF MINNEAPOLIS, ET AL., *Appellants*

Endorsed: Filed December 16, 1949. Grace Kaercher Davis, Clerk, Minnesota Supreme Court.

MATSON, *J.*:

SYLLABUS

1. The ordinance of 1875, together with the ratifying legislative act of 1879, granting the right to construct, maintain, and operate a street railway system in the city of Minneapolis, constitutes a valid and subsisting contract between the city and the street railway and, *ipso facto,* between the state and the street railway.

2. The ordinance of 1890 amending such contractual grant is valid and binding upon the parties.

3. A municipality, though operating under a home rule charter, is merely a department of the state, a political subdivision created as a convenient agency for the exercise of

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such governmental powers as may be entrusted to it; and pursuant to Minn. Const. art. 4, § 36, the legislature may, by the enactment of general laws, modify or withdraw any powers entrusted to a city with a home rule charter.

4. Since 1872, the city of Minneapolis has been possessed of police powers sufficiently broad to authorize the regulation of all forms of vehicular traffic upon its streets, inclusive of the regulation and licensing of streetcars.

5. In issuing licenses as a means of police power regulation, a license fee may be exacted to reimburse the city for the reasonable cost of issuing the license and for inspecting, supervising, and regulating the use which has been authorized.

6. A license fee under the police power may not be imposed for revenue purposes, but it is not fatal, however, that such license fee may incidentally yield some return in excess of the amount necessary to reimburse the city for its police regulatory service.

7. Where a municipal ordinance is adopted which would be lawful if intended for one purpose and unlawful if for another, the presumption is that a lawful purpose was intended, unless the contrary clearly appears.

8. The imposition of license fees, like taxes, entails one of the great functions of government, and the relinquishment of the power to discharge that function can be derived only from explicit and unequivocal language that is so free from ambiguity as to leave no room for construction.

9. The power to license is not always the power to deny, and thereby the power to destroy the franchise privileges which have been granted, since the exercise of such power may be contractually restricted to the field of police power regulation, which is always subject to a judicially enforceable standard of reasonableness.

10. M.S.A. 220.09 does not deprive the city of the right to issue licenses and to impose a reasonable license fee, but

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simply defines the field of local regulation and not the manner of its exercise.

11. Admissions by one who moves for judgment on the pleadings are admissions for the purposes of the motion only, and if the motion is denied or if the motion is granted and later reversed on appeal, the movant is not concluded from trying any issue of fact.

Reversed.

OPINION

MATSON, *Justice:*

Defendants appeal from a judgment on the pleadings in an action under the declaratory judgments act wherein a 1946 Minneapolis ordinance—purporting to amend an earlier street railway franchise grant by increasing the annual license fee for each car from $25 to $100—was held invalid and void.

Defendants are herein referred to collectively as the city and the plaintiff as the street railway. The following issues are raised: (1) The street railway has challenged the constitutionality—under both the federal and the state constitutions—of the 1946 ordinance, on the grounds that it impairs the obligation of a contract alleged to arise out of the original grant by the city, and in that it works a deprival of property without due process of law. (2) Assuming that the original grant by the city to the street railway constitutes a contract, can the city thereunder, pursuant to an exercise of the police power, increase the annual license fee provided for therein without the consent of the street railway? (3) Further, did the enactment by the legislature of the so-called Brooks-Coleman Act (L. 1921, c. 278, codified as M. S. A. 220.01 to 220.19) deprive the city of any police power control over street railways which it had theretofore possessed?

A consideration of these issues requires an examination of certain legislative enactments, both municipal and state. In 1875, the Minneapolis city council enacted an ordinance [1]

[1] Passed July 9, 1875, and approved July 17, 1875.

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which granted to the street railway the exclusive right to construct, maintain, and operate a street railway system. This grant, which was accepted by the street railway, was ratified by the state legislature. Sp. L. 1879, c. 299. Section 8 of the 1875 ordinance states that the street railway in establishing passenger rates shall fix them in such amount as the city council may deem just and reasonable, "provided, that the city shall not reduce the passengers' fare below five cents over any one continuous line, • • •." Section 9 thereof reads as follows:

> "Sec. 9. The Council of the City of Minneapolis *hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads* during the continuance of the rights and privileges hereby granted." (Italics supplied.)

In 1890, the city council adopted another ordinance,[2] which, in modification of the original grant, authorized the street railway to use electricity instead of animals or pneumatic power to propel its cars. This latter ordinance in part provides:

> "Sec. 7. This ordinance is *granted upon the express condition and requirement* that said Minneapolis Street Railway Company shall pay to the City Treasurer • • • *an annual tax or license fee of twenty-five dollars ($25) per car for the average number of cars operated* • • •. (Italics supplied.)
>
> "Sec. 8. In the construction, maintenance and operation of said lines of street railway said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An Ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordi-

[2] Passed June 27, 1890, approved July 2, 1890.

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nances of said city now in force or hereafter adopted, so far as applicable.

1-2. Basic to a consideration of issues herein is the established legal proposition that the ordinance of 1875, together with the ratifying act of 1879, granting the right to construct, maintain, and operate a street railway system in the city of Minneapolis, constitutes a valid and subsisting contract between the city and the street railway and, *ipso facto*, between the state and the street railway. City of Minneapolis v. Minneapolis St. Ry. Co. 215 U. S. 417, 30 S. Ct. 118, 54 L. ed. 259. The ordinance of 1890 amending such contractual grant has been accepted, and relied upon by both the city and the street railway, and the material changes thereby effected were all within the scope of the provisions made in the original grant in recognition of the need for future change It constituted a valid amendment of the contractual relation between the city and the street railway. See, Ordinance of 1875, §§ 4 and 9; City of Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417, 30 S. Ct. 118, 54 L. ed. 259; and Minneapolis St. Ry. Co. v. City of Minneapolis (C. C.), 155 F. 989.

3. Prior to, and separate and apart from a consideration of any changes that may have been effected in the contractual relation of the parties by the Brooks-Coleman Act, we proceed to determine what powers, if any, the city possessed and which could be exercised without impairing the obligations of the contract embodied in the ordinances of 1875 and 1890, to increase the annual license fee from $25 to $100 per car for the average number of cars operated. It is conceded that if any power to do so exists it must be a police power. Whatever police powers the city possesses are those conferred upon it by the state. A municipality, though operating under a home rule charter, is merely a department of the state, a political subdivision created as a convenient agency for the exercise of such governmental powers as may be entrusted to it. Pursuant to Minn. Const. art. 4, § 36, the legislature may, by the enactment of *general laws*, modify or withdraw any powers entrusted to a city with a home rule charter. Monaghan v. Armatage, 218

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Minn. 108, 112, 15 N. W. (2d) 241, 243. Apart from any grant to the city by virtue of the contract itself and the ratification thereof by the legislature, it is clear that since 1872 the city has been possessed of broad police powers. The following provisions, quoted in part from the home rule charter of the city of Minneapolis (adopted November 2, 1920), have been in effect in substantially their present forms since 1872, when they were first enacted by the state legislature as a part of Sp. L. 1872, c. X, subchapter I, § 1:

GENERAL POWERS

Chapter I, § 1: "* * * the 'City of Minneapolis,' * * * shall have all the general powers possessed by Municipal Corporations at common law, and in addition thereto shall possess all powers hereinafter specifically granted, * * *."

GENERAL WELFARE CLAUSE

Chapter IV, § 5. "The City Council shall have full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the *government and good order of the city*, * * * as it shall deem expedient, * * * and all such ordinances are hereby declared to be and to have the force of law." (Italics supplied.)

SPECIFIC AUTHORIZATION TO INCREASE OR REGULATE CARRIERS OF PASSENGERS

Chapter IV, § 5, subd. 31. "To license and regulate hackmen, draymen, expressmen, taxicab drivers *and all other persons engaged in carrying passengers, baggage or freight*, * * *." (Italics supplied.)[3]

4. A general welfare clause, substantially the same as the one above quoted, has been given a broad construction—as not limited by the specific enumeration of powers which follows it—by this court. In construing this clause in City

[3] See, Sp. L. 1872, c. X, subchapter IV, § 3, subd. 11, embodying the same phraseology except the words "expressmen" and "taxicab drivers."

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of Duluth v. Cerveny, 218 Minn. 511, 517, 518, 16 N. W. (2d) 779, 783, we said:

"• • • A city exercises police power within its jurisdiction to practically the same extent as the state itself. This power is not confined to the narrow limits of precedents based on conditions of a past era. Rather, it is a power which changes to meet changing conditions, which call for revised regulations to promote the health, safety, morals, or general welfare of the public. • • •

• • • • • • •

"Whatever the rule may be elsewhere, we are committed to a liberal interpretation of charter provisions as to the exercise of police power by municipalities concerning matters peculiarly subject to local regulation."

In State v. Sugarman, 126 Minn. 477, 479, 480, 148 N. W. 466, 467, a Minneapolis case, in holding that the city had the police power to regulate traffic under the general-powers and the general welfare clauses above quoted, we said:

"• • • The regulation of traffic upon the crowded thoroughfares of a large city is so imperative that a court should hesitate to deny that this is among one of the police powers granted to the same. • • • certain matters are so intimately connected with the exercise of municipal government and control that we do not necessarily look for express legislative authority on the subject. It is implied. • • •.

• • • • • • •

"• • • There is no specific restriction, and the regulation of traffic on the congested streets of a large city is so bound up with the good order thereof that the authority, wherever found in the charter, should be held to grant the power so to do."

Our observations in that case are applicable to all forms of traffic, inclusive of streetcar operation.

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The above-quoted paragraph (c. IV, § 5, subd. 31, of the city charter), providing for the licensing and regulating of those who carry passengers, speaks for itself. In Jefferson Highway Transp. Co. v. City of St. Cloud, 155 Minn. 463, 193 N. W. 960, an identical provision from the charter of the city of St. Cloud was construed to authorize the regulation and licensing of passenger buses. We see no sound basis for a holding that this provision is not equally applicable to streetcars. The form of the wheels of a vehicle, whether made to travel upon a common pavement or upon a steel track, does not determine its nature so much as the use to which the vehicle is put and for which it was designed. Both buses and streetcars are used to carry passengers. Frankford, etc., Ry. Co. v. City of Philadelphia, 58 Pa. 119, 98 Am. D. 242. The power of the city to license, as a means of regulation, also has been recognized by this court in Crescent Oil Co. v. City of Minneapolis, 175 Minn. 276, 221 N. W. 6.[4] Clearly, since 1872, the city of Minneapolis has been possessed of police powers sufficiently traffic upon its streets, inclusive of the regulation and licensing of streetcars.[5]

5-6. In the absence of express authorization by the legislature, a municipal corporation cannot by contract surrender or curtail its police power. Gardner v. City of Dallas (5 Cir.), 81 F. (2d) 425; 62 C. J. S., Municipal Corporations, § 139; People ex rel. City of Chicago v. Chicago City Ry. Co., 324 Ill. 618, 155 N. E. 781. It is also the general rule that in issuing licenses as a means of police power regulation, a license fee—unless the right to charge such fee has been expressly surrendered in a manner authorized by legislative enactment—may be exacted to reimburse the city for the reasonable cost of issuing the license and for inspecting,

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[4] Reversed on other grounds in *Crescent Oil Co.* v. *City of Minneapolis*, 177 Minn. 539, 225 N. W. 904.

[5] Specific authorization for the care and supervision of streets is found in c. VIII, § 1, of the Minneapolis home rule charter. This section was formerly part of Sp. L. 1881, c. 76, which was enacted approximately nine years prior to the 1890 ordinance for the amendment of the original street railway act of 1875. See, 38 Am. Jur., Municipal Corporations, § 367, in re regulatory license power where city has regulatory power over streets and vehicles.

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supervising, and regulating the use which has been authorized.[6] A license fee under the police power may not be imposed for revenue purposes. In other words, the service for which the city may be reimbursed must be reasonably related to the police power function of inspection, supervision and regulation. It is not fatal, however, that such license fee may incidentally yield some return in excess of the amount necessary to reimburse the city for its police regulatory service. Ramaley v. City of St. Paul, 226 Minn. 406, 33 N. W. (2d) 19; Johnson v. Philadelphia, 60 Pa. 445.

7. Plaintiff contends, however, that the exaction attempted by the 1946 amendatory ordinance is for the purpose of defraying the cost of services, which it maintains are clearly not related to the performance of any regulatory function under the police power. In other words, it is asserted that the proposed exaction is nothing more than a charge for franchise privileges already enjoyed by the street railway. It is true that the 1946 ordinance is so broad that it may be interpreted to cover services which are not properly related to the police power.[7] It is equally subject to interpretation that it was intended to apply only to a proper police power purpose. Where a municipal ordinance is adopted which would be lawful if intended for one purpose and unlawful if for another, the presumption is that a lawful purpose was

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[6] *City of St. Paul* v. *Dow*, 37 Minn. 20, 32 N. W. 860, 5 A.S.R. 811; *Jefferson Highway Transp. Co.* v. *City of St. Cloud*, 155 Minn. 463, 193 N. W. 960; *State ex rel. Remick* v. *Clousing*, 205 Minn. 296, 285 N. W. 711, 123 A.L.R. 465; 1 Dunnell, Dig. & Supp. § 1608; 38 Am. Jur., Municipal Corporations, §§ 349 and 366; 3 McQuillin, Municipal Corporations (Rev. 2 ed.) § 1102; 4 McQuillin, Municipal Corporations (Rev. 2 ed.) § 1816.

[7] The 1946 amendatory ordinance, adopted February 8, 1946, reads in part as follows:

"Section 2. The foregoing amendment to Section 7 of the above entitled ordinance is made by the City Council in the exercise of its police power because of additional cost in connection with the inspection of street cars, additional municipal services made necessary and furnished the company in the operation of its street cars, and the additional traffic problems and expense created by the greatly increased traffic upon the streets and avenues of the City, and is intended to be in addition to, and not a substitute for, other charges, such as paving between the tracks, snow removal, paving repair."

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intended, unless the contrary clearly appears. Ramaley v. City of St. Paul, 226 Minn. 406, 33 N. W. (2d) 19, M. S. A. 645.17(3).

8. We come to the gist of the case. Does the 1946 ordinance, increasing the annual license fee from $25 to $100 to defray the cost of police power regulation, impair the obligations of the contract between the city and the street railway? Section 7 of the ordinance of 1890 specifically states that the grant is *made upon the express condition and requirement* that the street railway shall pay an annual tax or license fee of $25. Are we by a process of construction or implication to read into this provision a meaning that a larger license fee may not be imposed? We think not. In City of Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417, 427, 30 S. Ct. 118, 121, 54 L. ed. 259, 268, involving another provision of the same contract, the court said:

> "• • • *Statutes and ordinances of this character are not to be extended by construction,* nor should they be deprived of their meaning, *if it is plainly and clearly expressed.*" (Italics supplied.)

In that case, the court held a Minneapolis ordinance unconstitutional as impairing the obligations of contract, in that it provided for a fare of less than five cents when the contractual grant explicitly stated that the "city shall not reduce the passengers' fare below five cents • • •." In the instant case, however, we do not have language which plainly and clearly expresses an intent that the annual license fee shall not be increased. An exemption from an obligation to pay a license fee sufficiently high to defray the reasonable cost of police regulation, like an exemption from taxation, is a privilege of such high order and is so rarely granted that it can be established only by the import of explicit language and not by implication or presumption. See, Ramaley v. City of St. Paul, 226 Minn. 406, 412, 33 N. W. (2d) 19, 22. Whatever is not unequivocally granted in franchise ordinances is taken to have been withheld, in that all such grants are to be strictly construed in favor of the public and against the grantee. Railway Co. v. Phila-

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delphia, 101 U. S. 528, 25 L. ed. 912; *Tilton* v. *City of Utica*, 60 N. Y. S. (2d) 249; see, 62 C. J. S., Municipal Corporations, § 137. In Union Passenger Ry. Co. v. City of Philadelphia, 83 Pa. 423, 433, involving a siimlar issue, the court said:

> "• • • The right of the state to impose such a tax, rate, or imposition in future, *cannot be taken away by a mere implication arising from a direction to pay a certain sum.*" (Italics supplied.)

The imposition of license fees, like taxes, entails one of the great functions of government, and the relinquishment of the power to discharge that function can be derived only from explicit and unequivocal language that is so free from ambiguity as to leave no room for construction. The holdings of the United States Supreme Court in similar cases are in accord. See, City of St. Louis v. United Rys. Co., 210 U. S. 266, 28 S. Ct. 630, 52 L. ed. 1054; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 12 S. Ct. 406, 36 L. ed. 121; Railway Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912.[8]

9. We find no merit in the implied assumption that the exercise by the city of a licensing power for police regulation is necessarily inconsistent with the preservation of the street railway's franchise privileges. In the first place, the power to license, which is a customary means of police regulation, was expressly reserved by the city as a part of the contractual grant. Secondly, the power to license is not always the power to deny, and thereby the power to destroy the franchise privileges granted, since the exercise of such power may be, as was done here, contractually restricted to

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[8] The decision of *Boise, etc., Water Co., Ltd.*, v. *Boise City*, 230 U. S. 84, 33 S. Ct. 997, 57 L. ed. 1400, is to be distinguished, in that the license fee involved therein was in fact a rental charge for the use of streets in which a right of user had theretofore become the property right of the water company by an earlier ordinance. No question involving the taxing or the police power was considered.

We have not overlooked *Tilton* v. *City of Utica*, 60 N.Y.S. (2d) 249. The ordinance involved therein, by its express terms, went beyond the sphere of a police power function of regulation, inspection, and supervision. The reasoning therein is apparently based on prior decisions pertaining to the imposition of a license fee for revenue purposes.

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the field of police regulation, which is always subject to a judicially enforceable standard of reasonableness. See, Hunstiger v. Kilian, 136 Minn. 64, 161 N. W. 263.

10. Finally, did the enactment of the so-called Brooks-Coleman Act[9] modify the city's police power control over the street railway? The act specifies that every grant theretofore or subsequently made by a city to a street railway shall be converted into an indeterminate permit when the street railway files with the city clerk its written declaration of consent to be bound by the act and a certificate thereof is filed with the secretary of state. Such declaration and certificate have been filed, and the rights of all parties to the grant must be determined in the light of the act.[10] M. S. A. 220.07 reads in part:

> "• • • When such certificate shall be filed • • • such grant, *subject to the provisions of this chapter*, shall become an indeterminate permit to own, operate, manage, and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, conditions, and obligations of such existing grant, *except as herein otherwise specifically provided*, shall continue in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the legislature of the state as hereinafter provided." (Italics supplied.)

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[9] See, L. 1921, c. 278, now MSA. 220.01 to 220.19.

[10] In the application of § 220.07, the consent of the city is wholly unnecessary, in that the city is merely a department or political subdivision of the state to which governmental powers have been entrusted and which powers, as embodied in a home rule charter, are, by the enactment of *general* laws (as distinguished from special) pursuant to Minn. Const. art. 4, § 36, subject to withdrawal or modification. *Monaghan* v. *Armatage*, 218 Minn. 108, 15 N. W. (2d) 241; see, 4 McQuillin, Municipal Corporations (Rev. 2 ed.) § 1803, at p. 1036.

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The italicized portion of the preceding statutory quotation reveals a legislative intent to make doubly certain that any grant converted thereunder to an indeterminate permit shall be preserved only to the extent that its terms are not in conflict with the specific provisions of the act as a whole, and that where any conflict appears, the act shall govern. The wording of the act, as well as the legislative history surrounding its enactment, indicates a legislative intent not to give the railroad and warehouse commission complete control over street railways. Instead, the attempt has been made to combine state with local control—that is, commission regulation with that of the municipality—in such a manner as to secure the advantages of both.[11] The principal power which was stripped from the cities and villages and given exclusively to the commission was the power to determine passenger rates. § 220.10. See, City of Duluth v. R. R. & W. H. Comm., 167 Minn. 311, 209 N. W. 10. On the other hand, certain other enumerated rights of police power regulation were vested *exclusively* in the council of *any* city of the state pursuant to § 220.09. In its use of the word "exclusive," the legislature has indicated the care with which it proceeded to divide the field of street railway regulation between the commission and local authorities. *Cf.* §§ 220.09 and 220.10. The act is a remedial measure and should be liberally construed to effect its purpose of making available to all municipal street railway systems coming under its scope the advantages of both commission and local control. In respect to the sphere of municipal regulation, we cannot agree that by becoming subject to the act the terms of the franchise grant were frozen so that no change could be made in the annual license fee. Any so-called "freezing" of terms could reasonably apply only to the grant *as a whole*, and this necessarily included the right reserved by the city under § 9 of the 1875 ordinance to make all necessary and usual police regulations concerning the operation and management of the street railway during the

[11] See, Hanft, *Control of Public Utilities in Minnesota*, 16 Minn. L. Rev. 457, 500 to 503.

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continuance of the grant. In other words, the *continuing* right of the city to make such police regulations was preserved, except insofar as that right was modified by the specific terms of § 330.09, which became paramount in defining and limiting the nature and scope of such regulatory power. Agreeable to the police power principles hereinbefore discussed, we find nothing in § 220.09 to indicate a legislative intent to deprive the city of the right to issue licenses and to impose a reasonable license fee as one of the customary and inherent aspects of police power regulation. Section 220.09 simply defines the field of local regulation and not the manner of its exercise.

11. The city errs in its contention that the street railway's motion for judgment on the pleadings has resolved in its favor all fact issues, such as the reasonableness of the license fee. A motion for judgment on the pleadings has the same effect as a general demurrer, and *for the purposes of the motion* admits as true all facts well pleaded by the opposite party. Vogt v. Genlisle Holding Co., 217 Minn. 601, 15 N. W. (2d) 91. The significance of the qualifying phrase *for the purposes of the motion* is not to be overlooked. An admission for the purposes of the motion is not an admission for the purposes of *all* future procedings. The real position of the party moving for judgment is that *if* the allegations of the opposite party be true in fact they are, nevertheless, insufficient in law. Admissions by one who moves for judgment on the pleadings are admissions for the purposes of the motion only, and, if the motion is denied or if the motion is granted and later reversed on appeal, the movant is not concluded from trying any issue of fact. See, Conway v. Elgin, 38 Minn. 469, 38 N. W. 370; Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535; Cammann v. Edwards, 340 Mo. 1, 100 S. W. (2d) 846; Vaughan v. Omaha Wimsett System Co., 143 Neb. 470, 9 N. W. (2d) 792.

It follows that the enactment by the city of the 1946 ordinance for the increase of the annual license fee per car from $25 to $100—subject, however, to a determination that such increase is necessary to defray the reasonable cost of police

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power measures and regulations *as authorized by § 220.09*— constituted a valid exercise of its police power, which did not impair any obligations of contract or work a deprivation of any property rights in violation of either the federal or state constitutions.

The judgment of the trial court is reversed.

Reversed.

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

Case No. 508

MINNEAPOLIS STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, Jr., as Mayor of the City of Minneapolis, CHARLES C. SWANSON, as City Clerk of City of Minneapolis, GLADYS E. MILLER, as City Treasurer of City of Minneapolis, and O. J. TURNER as City Comptroller of City of Minneapolis,
Appellees.

Appeal from the Supreme Court of Minnesota.

APPELLANT'S BRIEF

(In Answer to Appellees' Motion to Affirm or Dismiss.)

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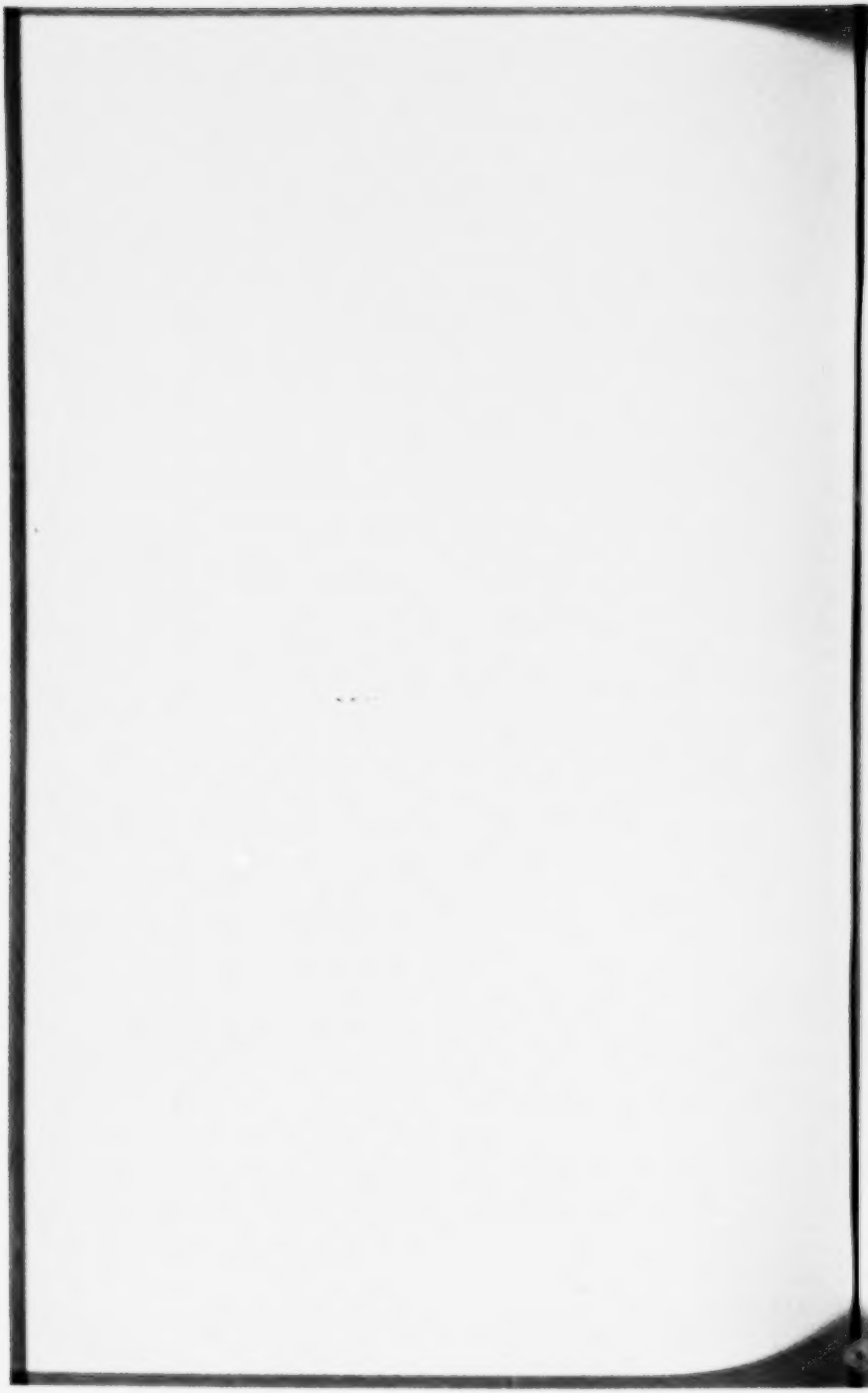

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

CASE NO. 563

MINNEAPOLIS STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., as Mayor of the City of Minneapolis, CHARLES C. SWANSON, as City Clerk of City of Minneapolis, GLADYS E. MILLER, as City Treasurer of City of Minneapolis, and O. J. TURNER as City Comptroller of City of Minneapolis,
Appellees.

Appeal from the Supreme Court of Minnesota.

APPELLANT'S BRIEF

(In Answer to Appellees' Motion to Affirm or Dismiss.)

ARGUMENT

In determining whether or not the judgment of the Supreme Court of Minnesota is appealable to this Court, the Appellant is faced with two perplexing problems:

1. When a question concerning the Constitutionality of an ordinance is raised and decided, in an action under a Declaratory Judgment Act, can that judgment be appealed to this Court?

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2. Is the declaration of the Minnesota Court with respect to the Constitutional question involved a final judgment under the interpretation placed on 28 U. S. C. A. (Revised 1948), Chapter 81, Section 1257, Subdivision 2?

A Declaratory Judgment Deciding a Constitutional Question Is Appealable.

In two cases decided by this Court,

Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927);

Warehouse Co. v. Tobacco Growers, 276 U. S. 71 (1928);

this general statement was made:

"This Court has no jurisdiction to review a mere declaratory judgment."

(*Warehouse Co.,* supra, p. 89.)

In *Liberty Warehouse Co.,* supra, the plaintiff sought a declaratory judgment, under the Declaratory Judgment Law of Kentucky, in the Federal District Court. At that time, there was no Federal Declaratory Judgment Act in existence and this Court held:

1. That a legislative act of Kentucky, establishing a procedural remedy could not extend the jurisdiction of a Federal Court;
2. That there were no adverse litigants and no actual claim was involved;
3. That plaintiff was seeking a determination of abstract questions or issues for the purpose of invoking advice without real parties or a real case;
4. That there was no "case or controversy" presented to the Federal Court and hence the Court was without jurisdiction.

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In the *Warehouse Co.* case, supra, the defendant interposed a counter-claim in a Kentucky state court which, among other things, sought a declaration of defendant's rights under the Kentucky Declaratory Judgment Law. The counter-claim was stricken by the lower court. It was held that under local practice, the Kentucky Court could refuse to exercise its power to declare rights and duties and, therefore, no Federal right was impaired by the lower court's action in this regard.

It would seem that this Court meant that no case or controversy involving a Constitutional question was presented under the state of the pleadings in these cases, rather than the general proposition that no judgment in a declaratory judgment action can be appealed to this Court, for, in *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U. S. 227 (1937), this Court held that an action under the Federal Declaratory Judgment Act did involve a "case or controversy" within the meaning of the Federal Constitution.

The case at bar involves threatened action by Appellees to enforce the 1946 Ordinance against Appellant, which Appellant claims to be in violation of and repugnant to the Constitution of the United States and, therefore, although this is an action for a declaratory judgment, we believe "a case or controversy" within the meaning of the Federal Constitution, is presented and that this Court has jurisdiction to entertain the appeal.

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The Judgment Determining the Const'tutional Question Involved, Is Final.

The provision of the Minnesota Declaratory Judgment Act pertinent to this appeal is:

36 *M. S. A.* 555.01, which provides as follows:

> "555.01. Courts to Construe Rights. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

From the language of this statute, it would seem that each right declared by the Supreme Court of Minnesota, whether affirmative or negative in character, would have the force and effect of a final judgment.

In the case at bar, three controverted questions were presented to the Minnesota Court:

1. Whether or not the Brooks-Coleman Act, (15 M. S. A. 220.01 through 220.26) withdrew the licensing power from the City Council of Minneapolis;
2. Whether or not the 1946 Ordinance impaired the obligation of the franchise between the Appellant and the city in derogation of Appellant's rights under the State and Federal Constitutions;
3. Whether or not the license fee imposed in the 1946 Ordinance was arbitrary and unreasonable.

The Minnesota District Court answered number (1) in the affirmative and did not pass on the other questions. The Minnesota Supreme Court answered number (1)

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and number (2) in the negative and remanded question number (3) to the District Court, for its determination.

In requesting this Court to hear the appeal, we are not unmindful of the numerous decisions of the Court defining "final judgment," among which are:

Republic Natural Gas Co. v. State of Okla., 334 U. S. 62 (1948);

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69 (1946);

Parker v. Morrill, 106 U. S. 1 (1882).

This Court stated, in *Parker v. Morrill*, supra:

> "It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one." (page 4.)

We have here neither a case at common law nor equity, but rather a type of action statutory in nature in which a declaration of rights is sought instead of a judgment or decree. By its very wording 36 *M. S. A.* 555.01 implies that a declaration by the Minnesota Court as to any question of right presented, is a final judgment as to that right. The only question in the instant case involving the Federal Constitution, is question number (2) and, since the Supreme Court of Minnesota declares that the 1946 Ordinance, whether reasonable or unreasonable, does not impair the obligation of contract, it would seem that such declaration is a final judgment within the definition of 28 U. S. C. A. (Revised 1948), Chapter 81, Section 1257, Subdivision 2, and hence the appeal is properly presented at this time.

We have been unable to find any authority on this precise question and to forego an appeal at this time would mean that Appellant would lose its right to be heard at a later date, if its interpretation of "final judgment" with

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respect to an action for a declaratory judgment is correct, inasmuch as an appeal from a final judgment must be taken within three months after the entry of such judgment (28 U. S. C. A. (Revised 1948), Chapter 113, Section 2101, Subdivision c.).

A Substantial Federal Question Is Involved.

Appellees in their opposing statement cite numerous cases at pages 5 and 6 in support of the accepted principle that a city cannot contract away its police power. From this principle Appellees argue that the city could not under any circumstances limit the amount of license fee to be charged Appellant. It is interesting to note that Appellees contradict their own contention by citing other cases at pages 7 and 8 wherein it is held that if the language of a contract clearly expresses a city's intention to limit the amount of license fee that the same can be done.

There can be no dispute but that the original grant or franchise and all amendments thereto constitute a valid and subsisting contract between the Appellant and the city and ipso facto between the Appellant and State of Minnesota.

City of Minneapolis v. Minneapolis Street Railway Co., 215 U. S. 417 (1910).

Minneapolis Street Ry. Co. v. City of Minneapolis, — Minn. —, 40 N. W. (2d) 353 (1949).

It is Appellant's contention that the wording of the 1890 Ordinance imposing a license fee of $25 per streetcar clearly expresses the Appellant's intention to charge only a $25 license fee per streetcar during the period of the franchise bringing this appeal within the principles announced in

Louisville v. Cumberland Telephone Co., 224 U. S. 649 (1912);

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City of Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417 (1910);

Detroit v. Detroit Citizens St. Ry. Co., 184 U. S. 368 (1902);

wherein it was held that an ordinance of a city which attempted to abrogate or nullify any of the rights or privileges in a grant or franchise would be an impairment of contract prohibited by Article I, Section 10, of the Federal Constitution.

The precise question to be presented in this appeal was discussed by the Court in *St. Louis v. United Railways Co.*, 210 U. S. 266 (1908), wherein it is stated:

> "The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a state or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the state or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. The section of the Missouri constitution and the laws, to which we have referred, clearly show that while the franchise of the corporation essential to its existence is derived from the state, the city retains the control of its streets, and the use of them must be acquired from the municipal authorities upon terms and conditions which they shall fix. *Blair v. Chicago*, 201 U. S. 400" (pages 273-74).

In that case as well as the cases of *Railway Company v. Philadelphia*, 101 U. S. 528 (1879); *Railway Company v. New Orleans*, 143 U. S. 192 (1892); the Court held that although a city could set a limit on license fees by contract, that under the facts of each of those cases the

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city's intention was not clearly expressed, and therefore there was no impairment of the obligation of contract.

Many of the points argued in the section of Appellees' statement entitled "No Substantial Federal Question is Presented by the Attempted Appeal" are arguments that should be properly contained in Appellees' brief if this Court takes jurisdiction, and to answer those points would require a complete argument on the merits of the contentions presented which should be argued in the main briefs and not at this time.

We respectfully submit that the question of whether or not the 1946 Ordinance impairs the obligation of contract between Appellant and the city is a substantial Federal question, and this Court should take jurisdiction of the appeal.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 563

MINNEAPOLIS STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., AS MAYOR OF THE CITY OF MINNEAPOLIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN F. BONNER,
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PALMER B. RASMUSSON,
Assistant City Attorney,
Counsel for Appellees.

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IN SUPREME COURT, STATE OF MINNESOTA

Case No. 34935

MINNEAPOLIS STREET RAILWAY COMPANY,
Plaintiff-Respondent,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., AS MAYOR OF THE CITY OF MINNEAPOLIS, CHARLES C. SWANSON, AS CITY CLERK OF CITY OF MINNEAPOLIS, GLADYS E. MILLER AS CITY TREASURER OF CITY OF MINNEAPOLIS, AND O. J. TURNER, AS CITY COMPTROLLER OF CITY OF MINNEAPOLIS, *Defendants-Appellants*

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellees in the above entitled cause and for their joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that an ordinance of the City of Minneapolis increasing the license fee for each street car operated on its public streets from that of $25.00 as fixed in appellant's

franchise ordinance in 1890, to that of $100.00 per street car as fixed by the 1946 ordinance here under attack, is contrary to and in violation of appellant's existing grants and franchise and impairs the obligation of said contract and franchise in violation of Article I, Section 10, and the Fourteenth Amendment of the Constitution of the United States. These claims the appellees deny and the State Supreme Court in the opinion and judgment here challenged determined the question so raised by appellant adversely to it. The court found that Section 9 of the 1875 ordinance provides as follows:

> "Sec. 9. The Council of the City of Minneapolis *hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads* during the continuance of the rights and privileges hereby granted." (Italics supplied.)

and that Sections 7 and 8 of the 1890 Ordinance provide as follows:

> "Sec. 7. This ordinance is granted upon the express condition and requirement that said Minneapolis Street Railway Company shall pay to the City Treasurer • • • an annual tax or license fee of twenty-five dollars ($25) per car for the average number of cars operated • • •."
>
> "Sec. 8. In the construction, maintenance and operation of said lines of street railway said Minneapolis Street Railway Company, its successors and assigns, *shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An Ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable.*" (Italics supplied.)

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M.S.A. 220.07 (part of the so-called Brooks-Coleman Act whereby the state legislature converted the franchise into an indeterminate permit) provides:

> "When such certificate shall be filed • • • such grant, *subject to the provisions of this chapter*, shall become an indeterminate permit to own, operate, manage, and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; *but all of the terms, conditions, and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue.* • • • " (Italics supplied.)

Thus the City of Minneapolis retained its right to regulate by the exercise of its police power:

(1) Because such power cannot be contracted away;

(2) Because express reservation of such exercise was made in the 1875 ordinance which reservation became part of the 1890 ordinance and the Brooks-Coleman Act above quoted, and is and constitutes part of the franchise.

II. The Judgment Attempted to be Appealed from Is Not Final

The statutory provision relied on by appellant does not sustain the jurisdiction of the Supreme Court of the United States in that the decision appealed from does not constitute a final judgment or decree. 28 U. S. C. A. (Revised 1948) Chapter 81, Section 1257, Subdivision 2, reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "• • • • •
>
> "(2) By appeal, where is drawn in question the validity of the statute of any state on the ground of its being

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repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

That portion of the decision by the Supreme Court of the State of Minnesota from which this appeal is attempted to be taken and as set forth in appellant's statement of jurisdiction reads as follows:

> "It follows that the enactment by the city of the 1946 ordinance for the increase of the annual license fee per car from $25 to $100—*subject, however, to a determination that such increase is necessary to defray the reasonable cost of police power measures and regulations as authorized by Sec. 220.09*—constituted a valid exercise of its police power, which did not impair any obligations of contract or work a deprivation of any property rights in violation of either the federal or state constitutions." (Italics supplied.)

The judgment involved was one on the pleadings and the italicized portion of that part o fthe decision from which this appeal is attempted to be taken clearly requires that the reasonableness of the additional fees imposed be first determined. Consequently, should the attempted increase of the license fees be held to be unjustified and unreasonable appellant's rights under its franchise could in no way be affected and no federal constitutional question would be involved. It is our contention that inasmuch as the judgment from which this appeal is attempted to be taken is conditioned upon a future determination of the reasonableness of the increase in license fees the judgment is not final within the meaning of Title 28, above referred to, so as to entitle appellant to invoke the jurisdiction of the Supreme Court of the United States.

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III. No Substantial Federal Question Is Presented by the Attempted Appeal

Appellant relies on the following cases to sustain the jurisdiction of this appeal:

Louisville v. *Cumberland Telephone Co.*, 224 U. S. 649 (1912);

Minneapolis v. *Street Railway Company*, 215 U. S. 417 (1907);

Detroit v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368 (1902).

Briefly, in the *Louisville* case the state legislature granted a franchise to the Ohio Valley Telephone Company to which the defendant Cumberland Telephone Company later succeeded. The City Council of Louisville later "ratified and confirmed" the rights so granted and in 1909 the City Council repealed outright the ordinance of 1886 constituting the company's franchise. In the instant case the City of Minneapolis has merely increased the annual license fee for each street car for the use of the streets and clearly the *Louisville* case is not applicable. The other two cases involve the fixing of rates of fare, which rates were agreed upon in the original franchise and in each case the respective city council attempted to reduce the rate of fare so agreed upon.

Clearly those cases attempted to regulate the relationship between the company and its patrons rather than that between the city and the company for the use of the public streets and the manner of conducting the business and none of the cases so relied on by the appellant are applicable in the instant case.

The Supreme Court of the State of Minnesota determined that the city had ample power to pass the ordinance

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and that the ordinance was so passed in the exercise of the city's police power. Such power cannot be contracted away.

> "The state can no more abdicate its trust over property in which the whole people are interested, • • • than it can abdicate its police powers in the administration of government and the preservation of the peace."
> *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 453.

> "The constitutional prohibition upon State laws impairing obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts for all property, whether owned by natural persons or corporations."
> *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672.

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. • • • And also that 'a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.' "
> *N. Y. and N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556, 567, 571;
> *Hendrick* v. *Maryland*, 235 U. S. 610 (Motor vehicle license fees).

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In *New Orleans Public Service* v. *City of New Orleans*, 281 U. S. 682, the company had a franchise granted by the city for the operation of a street railway system. One of its lines was constructed along an avenue which intersected a railroad track. The railroad objected to the street railway crossing its track at grade. The city passed an ordinance directing the construction of a viaduct which the street railway company was willing to construct whereafter the company built a single track trestle viaduct. Later the city required the company to remove said viaduct and construct in its place double tracks at street level across the railroad track which the company refused. On page 686, the court said:

> "The ordinance now under consideration does not aim to destroy or to exact payment for the right of appellant to use the street for the operation of its street railway. *It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.*" (Italics supplied.)

In *St. Louis* v. *Western Union Telegraph Company*, 149 U. S. 465, it is said on page 469:

> "The word 'regulate' is one of broad import. * * * If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

On Page 471:

> "The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use, is persuasive that fixing a price for the use is such a regulation."

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In *Baltimore* v. *Baltimore Trust Company*, 166 U. S. 673, the municipal authorities directed the street railroad company to maintain but one track on a certain street instead of the double track originally granted to the company. The court held that the change was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the company, and said on page 684:

> "If it be said in this case that the city had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously."

The case of *Railway Company* v. *Philadelphia*, 101 U. S. 528, is one very similar to the instant case. There the original franchise provided for a $30 license fee for each car and later the legislature provided that the railway company should pay to the city a license fee of $50 for each car per year. On pages 539 and 540, the court said:

> "Charters of private corporations duly accepted, it must be admitted, are in general executed contracts, but the different provisions, *unless they are clear*, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor

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of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms." (Italics supplied.)

"Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporators."

To same effect is *Railway Company* v. *New Orleans*, 143 U. S. 192, both cases of which are followed in *St. Louis* v. *United Railways Company*, 210 U. S. 266, where the court held that the ordinances of the city of St. Louis granting rights of construction and operation to street railways do not contain any *clearly expressed obligation on the part of the city to surrender its right to impose further license fees upon the street railway cars*, and said on page 280:

> "It seems to us that this case is virtually decided by the rule laid down in *Railway Company* v. *New Orleans*, 143 U. S. 192, supra, which holds that because a street railway company has agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation."

It is respectfully submitted that the provisions of the 1890 ordinance setting the license fee at $25 and further providing that all rights thereof shall be subject to all terms and conditions of the 1875 ordinance wherein the exercise of the police power was reserved by the city, clearly reserve in the city the right of regulation by the exercise of the police power and do not constitute any surrender thereof.

We further submit that the question presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling ap-

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pellant to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Minnesota be affirmed.

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No. 563. MINNEAPOLIS STREET RAILWAY CO. *v.* MINNEAPOLIS ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment. *Fred A. Ossanna* for appellant. *John F. Bonner* for appellees. Reported below: 229 Minn. 502, 40 N. W. 2d 353.